1996

Robert Smith v. Mity Lite, Workers' Compenation Fund of Utah, Employers' Fund : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ROBERT SMITH,	:	
Petitioner,	:	Case No.: 960441-CA
v.	:	Oral Argument Priority No. 7
MITY LITE and WORKERS' COMPENSATION FUND OF UTAH, and EMPLOYERS' FUND,	:	
Respondents.	:	

PETITIONER'S REPLY BRIEF

PETITION FOR REVIEW OF THE FINAL DECISION
AND ORDER OF THE UTAH INDUSTRIAL COMMISSION

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TABLE OF CONTENTS

ARGUMENT 1

I. THE COMMISSION ACTUALLY FOUND MEDICAL CAUSATION 2

III. THE ODD LOT DOCTRINE IS APPLICABLE 8

IV. THE INDUSTRIAL COMMISSION ORDER MUST BE REVERSED BECAUSE IT FAILED TO APPLY THE SEQUENTIAL DECISION MAKING PROCESS 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases cited:

Allen v. Industrial Comm., 729 P.2d 15 (Utah 1986) 5

Crosland v. Industrial Comm., 828 P.2d 528 (Utah Ct. App. 1993) 5

Hardman v. Salt Lake City Fleet Management,
725 P.2d 1323 (Utah 1986) 9

Hoskins v. Industrial Comm.,
918 P.2d 150 (Utah Ct. App. 1996) 9

Marshall v. Industrial Comm.,
681 P.2d 208 (Utah 1984) 9

Spencer v. Industrial Comm., 733 P.2d 158 (Utah 1987) 6, 7

Zimmerman v. Industrial Comm. of Utah, 785 P.2d 1127 (Utah Ct. App. 1987) 3, 4

Zupon v. Industrial Comm.,
860 P.2d 960 (Utah Ct. App. 1993) 5

Statutes and Rules:

Utah Administrative Code R. 490-1-17 (1988) 10-12

Utah Code Ann. § 35-1-45 (1988) 5

Utah Code Ann. § 35-1-66 (1988) 5

Utah Code Annotated § 35-1-67 (1988) 10, 12

ARGUMENT

The Industrial Commission (Commission) in this matter found that Mr. Smith suffered an injury to his back on May 23, 1990. (R. 123). Mr. Smith had previously suffered no problems with his back. Id. He injured his back in the course and scope of his employment while lifting a heavy pallet. Id. Subsequently, he underwent three surgeries to his back for a herniated disc. (R. 124). He has not worked since the accident and has been awarded total disability benefits by the Social Security Administration arising out of the same industrial accident. (R. 55 and 124).

At the time of the accident Mr. Smith was forty-five years old. He cannot read a newspaper or balance a checkbook and has no formal education past the fifth grade. (R. 200). The medical panel convened at the request of the ALJ characterized his educational impairment as "severe." (R. 76). The medical panel has also found that Mr. Smith will need further medical treatment in the future, a finding which the Commission adopted as its own. (R. 75).

The Commission sustained the ALJ's award of temporary total disability and permanent partial disability benefits arising out of the same industrial accident. Yet, the Commission denied the petitioner's claim for permanent total disability benefits upon the grounds that Mr. Smith had failed to show that his claimed total disability was medically caused by the industrial accident upon a preponderance of the evidence. This determination as to medical causation must be reversed because the Commission finding as to medical causation as to temporary total disability and permanent partial disability benefits and its conclusion as to medical causation are inconsistent. Additionally, the Commission failed to follow its own rules and procedures as well as the applicable law in reaching its conclusion as to medical causation. The Commission

avoided the sequential decision-making analysis as well as the odd lot doctrine. Finally, the Industrial Commission improperly relied upon the medical panel's conclusions.

I. THE COMMISSION ACTUALLY FOUND MEDICAL CAUSATION

Two findings of fact highlighted by Mity Lite in their brief form the crux of this appeal. "**Much** of Mr. Smith's current inability to return to work stems from factors other than the results of the injury." ALJ's findings as adopted by the Commission at R.101, cited in Respondent's Brief at 9 (emphasis added). So stated, the inverse must mean that some of Mr. Smith's current inability to return to work does in fact stem from the results of the industrial injury (i.e, medically caused). The commission further found: "**A large portion** of his disability is not caused by objective factors." (emphasis added). The Commission Order R. 135, cited in Respondent's Brief at 9. This statement as well, stated inversely, points out that some portion of Mr. Smith's disability is caused by objective factors related to the industrial accident.

Essentially, the ALJ and the Commission factually found medical causation and then erroneously legally concluded that unless a disability is wholly caused by a work related injury, medical causation for the purposes of permanent total disability has not been shown.

Mity Lite itself cites the ALJ findings, supported by the opinions of all doctors, that Mr. Smith:

> . . .will not be able to return to heavy lifting. The employer has shown a willingness to accommodate Mr. Smith although the positions which it offered were not found to be appropriate at this time until Mr. Smith is weaned from his narcotics and is conditioned for light duty or sedentary work.

(R. 102, cited in Respondent's Brief at 10). Accordingly, at the time the Commission made its decision, there was no question that Mr. Smith could not do the heavy labor that he was doing at

the time of his industrial accident, and at the time of the Commission's review, could not even do light duty or sedentary work.

Had the Industrial Commission found the facts to be different, then the basis for this appeal might not exist. Had the Commission stated "**All** of Mr. Smith's current inability to work stems from factors other than the results of the injury," or "**none** of his disability is caused by objective factors," then perhaps there would be a basis for the Industrial Commission to conclude that medical causation had not been found. In this case, medical causation had actually been found, but the Commission lost sight of that finding in its determination of permanent total disability, failed to apply its own rules, and failed to apply the odd lot doctrine.[1]

Mity Lite argues that "unless the claimant has suffered a compensable industrial injury, [the odd lot] doctrine is inapplicable no matter how compelling the other factors." See Brief of Respondents at 17. Mity Lite cites this court's ruling in Zimmerman v. Industrial Commission of Utah, 785 P.2d 1127, 1132 (Utah Ct. App. 1987) for this proposition. However, a review of

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[1]The question of the odd lot doctrine was clearly preserved below. First, there can be no question that the issue of medical causation has been preserved as that was the basis of petitioner's motion for review from the outset. Second, Commissioner Thomas Carlson's dissent to the Industrial Commission Order can only be reasonably construed as an odd lot analysis. Lastly, Mity Lite itself addressed the odd lot doctrine specifically in its response to applicant's motion for reconsideration. See Mity Lite's response at 3. Applicant was arguing that due to his age, educational background, training and mental capacity, he could be found disabled. While the term "odd lot" may not have been exhaustively and repetitiously used throughout the pleadings, the import of the petitioners argument is the same. That is, because the petitioner presented uncontroverted evidence of his impairment arising out of a compensable injury, and because he demonstrated an inability to perform the work required by his job, and due to his age, educational background, training and mental capacity, he was in fact permanently and totally disabled.

the Zimmerman decision shows that it supports the petitioner's argument. In Zimmerman, the medical panel convened at the request of the ALJ found:

> 1. There is **no** medically demonstrable causal connection between the applicant's ongoing problems and the industrial accident. . . .
>
> 2. **All** of the residual problems complained of by the accident were caused by a pre-existing condition.
>
> . . .
>
> 6. **No** portion of the permanent physical impairment is attributable to the applicant's industrial injury.

Id. at 1129. (emphasis added). Thus, in Zimmerman the medical panel found no causal connection between the claimed injuries and the industrial accident, that all the residual problems were due to a pre-existing condition, and that no portion of the permanent physical impairment was attributable to the industrial injury. Thus, a finding of no medical causation was supported by the evidence in Zimmerman.

In contrast, in the present case, such exclusive findings were not found, nor could be found, under the evidence before the Commission. By adopting the medical penal report, the Commission implicitly found (1) that Mr. Smith had experienced no problems with his back prior to the industrial accident (R. 71, 74); (2) that he has a 13% whole person permanent impairment to his low back, 2/3 of which is attributable to the industrial accident and characterized by the Commission as "not inconsequential," (R. 125); and (3) that Mr. Smith's industrial injury to his back contributes to his current disability. (R. 74-76). The foregoing facts, coupled with the Commission's acknowledgment that Mr. Smith has not worked since his industrial accident, makes it obvious that the Commission found that Mr. Smith's pre-existing back problems, if any, had been asymptomatic, but are now significant. While reviewing only a

single industrial accident, the Commission arrived at the untenable conclusion that it should award permanent partial impairment benefits and temporary total disability benefits for a "compensable injury", but not permanent total disability benefits due to a lack of medical causation, or in other words, a failure to show a nexus to a "compensable injury." Such a conclusion by the Commission is illogical, irrational, and erroneous.

Both temporary total disability and permanent partial disability awards require a finding of medical causation. See Utah Code Annotated § 35-1-66 and § 35-1-45 as well as Allen v. Industrial Commission, 729 P.2d 15 (Utah 1986). See also Crosland v. Industrial Comm., 828 P.2d 528 (Utah Ct. App. 1993).[2] Accordingly, it is simply inconsistent for the Industrial Commission to claim that medical causation was shown as to permanent partial and temporary total disability, but to bar a claim for permanent total disability benefits upon a factual finding that medical causation had not been shown. For this reason, the Industrial Commission's Order must be reversed.

II. MR. SMITH'S PSYCHIATRIC PROBLEMS DO NOT BAR THE APPLICATION OF THE ODD LOT DOCTRINE OR A FINDING OF MEDICAL CAUSATION

In paragraph 19 of the ALJ's findings of fact which the Commission adopted, the ALJ stated:

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[2]Petitioner recognizes that in Zupon v. Industrial Commission, 860 P.2d 960, 963 (Utah Ct. App. 1993), this court held that a finding of permanent partial disability 15 years before a claim of permanent total disability did not preclude a finding of no medical causation under the Allen test. However, in Zupon a substantial period of time had passed between the permanent partial disability finding and the permanent total disability claim. More importantly, in Zupon the Social Security Administration had granted permanent total disability benefits for injuries that were not industrial. In reality, the Zupon holding rested upon the fact that the claimed disability had no relationship at all to an industrial accident.

> Much of Mr. Smith's current inability to work stems from factors other than the results of the injury. He has a personality disorder according to both the psychiatrists on the medical panel (Dr. Burgoyne) and the psychologists (Dr. McCann) who performed the independent medical examination. The personality disorder pre-existed his physical injury. Dr. Burgoyne agreed with the diagnosis of Dr. McCann.

Mity Lite maintains that such a finding presents substantial evidence in support of the Commission's conclusion of no medical causation as to the claim for permanent total disability in this matter. In fact, Mity Lite goes on to define for this court the terms "conversion disorder", "somatoform", and "psychogenesis". The underlying current of Mity Lite's brief is that given Mr. Smith's psychological disabilities, a finding of medical causation could not be sustained. This is inaccurate for several reasons.

The mental acuity and psychological health of Mr. Smith did not prevent his working prior to the industrial accident at issue. Additionally, the psychological factors actually have no bearing on the issue of medical causation. Where the Commission, like the ALJ, had already found that some of his disability was attributable to the industrial accident, medical causation had already been found. The fact that a person has problems other than those directly caused by an industrial accident does not preclude a finding of medical causation as to permanent total disability.

Lastly, to support Mity Lite's and the Commission's position that the psychological aspects of Mr. Smith's condition preclude a finding of medical causation ignores the Utah Supreme Court case of Spencer v. Industrial Commission, 733 P.2d 158 (Utah 1987). In Spencer, the Industrial Commission's Order was reversed where permanent total disability benefits had been denied under the doctrine of res judicata. While remanding the matter, the

Supreme Court of Utah made additional comments which are germane here. In Spencer, a claimant was alleged to have "factitious seizure disorder," "conversion reaction," or "hysterical conversion symptoms." Similar assertions have bene made in this case. However, there has been no showing in this matter that Mr. Smith's drug habits pre-existed his industrial accident. It must be noted that the opiate drugs that he takes were prescribed by health care providers treating him for the injuries suffered in the industrial accident. While the psychiatrists did find that some of Mr. Smith's psychological problems, such as depression, pre-existed the industrial accident, there is no evidence that such psychological problems precluded him from carrying on any employment. The court in Spencer held:

> The medical panel's findings and the administrative law judge's adoption of those findings of permanent partial impairment conclusively establish the legitimacy of Spencer's impairment.

Id. at 162. The same could be said in the present case. The medical panel and administrative law judge did find a permanent impairment directly attributable to the industrial accident. The Spencer court went on to state:

> When there has been a physical accident or trauma and a claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysteria paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable.

Id. Thus, many of the psychological problems currently suffered by Mr. Smith are in fact attributable to the accident. While some of these psychological problems may have pre-existed the accident, they were exacerbated by the industrial accident in such a way as to preclude him from working. This is an established fact since Mr. Smith worked and supported his family prior

to the industrial accident. Obviously, conversion disorder, if claimed to be a product of the present claim, arose out of the industrial accident at issue.

In sum, the fact that Mr. Smith has psychological problems, some of which may have even pre-existed the industrial accident, does not bar a finding of permanent total disability nor the application of the odd lot doctrine.

III. THE ODD LOT DOCTRINE IS APPLICABLE

Mity Lite claims the odd lot doctrine does not apply because the petitioner was forty-five years old, had a rate of pay between four and six dollars an hour, and evidence existed that Mity Lite would tailor a job to fit his circumstances. The foregoing facts, even if all true, would not preclude the invocation of the odd lot doctrine.

The age of an individual is a factor to be considered, but is not conclusive. Mity Lite has cited no case law whatsoever which would indicate that age of an individual is determinative. In any event, the Commission could have concluded that at the age of forty-five and given the educational background of Mr. Smith, the amount of education necessary to make him a viable candidate for any work would be too great to justify. Likewise, his rate of pay argues in favor of a finding of total disability under the odd lot doctrine, not against it. The fact that Mr. Smith has never made more than six dollars an hour is indicative of the fact that his jobs in the past have been exclusively manual labor requiring no real job skills.

Lastly, Mity Lite's assertion that they would tailor a job for Mr. Smith is irrelevant and in any event is not supported by substantial evidence. Mity Lite attempted at the hearing in this matter by way of hearsay evidence to prove Robert Smith could have received other employment. Recognizing the hearsay problems, the ALJ only conditionally allowed in records

of alternative employment. (R. 232). As explained in petitioners principle brief, to find alternative employment availability based upon hearsay alone constitutes reversible error. See Hoskins v. Industrial Commission, 918 P.2d 150, 158 (Utah Ct. App. 1996).

Mity Lite has wholly failed to distinguish the applicability of Hardman v. Salt Lake City Fleet Management, 725 P.2d 1323 (Utah 1986) and Marshall v. Industrial Commission, 681 P.2d 208 (Utah 1984). In both Hardman and Marshall applicants were found to be totally and permanent disabled although only a relatively small percentage of their physical impairment was due to an industrial accident. Hardman and Marshall are directly applicable to the present matter in that it remains uncontroverted that Robert Smith suffered a compensable injury. The Commission's Order simply cannot be reasonably interpreted as providing a factual finding that no compensable injury occurred. If it could, the Commission would not have granted Mr. Smith any benefits.

In sum, the Commission in fact found that a compensable injury had occurred, and that that same compensable injury constituted a part of Mr. Smith's claimed disability. At that point, the Commission had found medical causation and should have applied the sequential decision-making analysis as mandated by statute and the odd lot doctrine as mandated by law. Because it did not apply these standards, the Commission's order must be reversed and this matter remanded.

The applicability of the present factual situation to the odd lot doctrine was well argued by Commissioner Carlson in his dissent to the Industrial Commission Order.

> The fact that Mr. Smith suffered an industrial accident on May 23, 1990 is admitted. Before the accident, he worked and supported his family. After the accident, he underwent a series of back surgeries that left him in pain and

> dependent on medications. Furthermore, he is now forty-five years old, has only a fifth grade education and is functionally illiterate. In this day and age, it is practically impossible for Mr. Smith to compete with younger, stronger, healthier workers for the few unskilled light duty jobs he is theoretically qualified to perform. In my view, Mr. Smith's injury at work unleashed a cascade of events that has left him permanently and totally disabled. This opinion is supported by the fact that Mr. Smith has been awarded social security disability benefits for essentially the same injuries that are at issue in this Worker's Compensation case.

(R. 127). Both the Commission below and Mity Lite argue that a large portion of Mr. Smith's disability arises out of his mental condition. However, as the law clearly provides, the odd lot doctrine takes into consideration mental capacity. Thus, Mr. Smith's mental deficiencies argue in favor of, not against, the application of the odd lot doctrine.

Because the Industrial Commission found that a compensable injury had occurred, it should have applied the odd lot doctrine. Because the Industrial Commission denied Mr. Smith's claim on an erroneous basis, the order of the Industrial Commission must be reversed.

IV. THE INDUSTRIAL COMMISSION ORDER MUST BE REVERSED BECAUSE IT FAILED TO APPLY THE SEQUENTIAL DECISION MAKING PROCESS

By way of Utah Code Annotated § 35-1-67(1) (1988) the legislature of the State of Utah provided that an employee is entitled to receive compensation when their permanent total disability is caused by an industrial accident. The legislature in § 35-1-67(1) mandated in pertinent part:

> The Commission shall adopt rules that conform to the substance of the sequential decision making process of the social security administration under 20, C.F.R. subsections 404.1520(b), (c), (d), (e), and (f)(1) and (2) as revised.

The Industrial Commission followed the mandate of the legislature and promulgated Utah Administrative Code R. 490-1-17. See, R.490-1-17 reproduced in its entirety in Addendum Four of Petitioner's Principle Memorandum. R. 490-1-17(A) provides:

> The Commission is **required** under Section 35-1-67, U.C.A., to make a finding of total disability as measured by the substance of the sequential decision-making process of the Social Security Administration, under Title 20 of the Code of Federal Regulations, as revised.

(emphasis added). Thus, unlike Mity Lite in the present matter, the Commission itself construed Utah Code Annotated § 35-1-67 to require the application of the sequential decision-making process. In this matter, the Commission promulgated rules requiring certain actions on its part, and then failed to follow its own rules. Interestingly, the Commission could have made a determination of permanent total disability without looking to the sequential decision making process if it had chosen to follow the invitation of R. 490-1-17(B) which allows the Commission to use the Social Security Administration's determination as to disability in lieu of instituting a process on its own behalf. In this matter, Mr. Smith had been awarded permanent total disability status by the Social Security Administration. (R.55).

R. 490-1-17(d) provides:

> To make a tentative finding of permanent total disability the Commission **shall** rely upon and be guided by the rules of disability determination published by the Social Security Administration Office of Disability Publication SSA, Pub, No. 64-104, as amended. In short, the sequential decision-making process referred to requires a series of questions and evaluations to be made in sequence. These are:
> 1. Is the claimant engaged in a substantial gainful activity?
> 2. Does the claimant have a medically severe impairment?
> 3. Does the severe impairment meet or equal the listed impairments in appendix one of SSA, Pub, No. 64-104?
> 4. Does the impairment prevent the claimant from doing his or her previous work?

Three out of four of the questions of the sequential making process can be answered from the Commission's order alone. As to question number one, Mr. Smith is not engaged in a substantial gainful activity. The Industrial Commission itself noted that Mr. Smith has not

worked since his industrial accident. Question number two must be answered in the affirmative as the Commission itself stated that Mr. Smith suffers from a back impairment due to his industrial accident which is "not inconsequential." Lastly, the Commission by adopting the medical panel's report specifically found that his impairment does prevent Mr. Smith from doing his previous work of heavy lifting. Whether the impairment of Mr. Smith meets or equals the list of impairments in appendix one of SSA, Pub. No. 64-104 is a determination which will need to be made on remand. Likewise, the evaluation and rehabilitation workup of the state office of rehabilitation awaits a determination on remand. Such a determination by the state office of rehabilitation is required by R. 490-1-17.

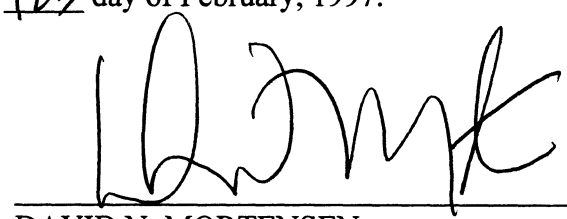
In sum, Utah Code Annotated § 35-1-67 provides for the Commission to enact R. 490-1-17 and the Commission in fact adopted these rules and now should be required to follow them. The rules themselves state that the Commission is required to review a claim of total disability as measured by the substance of the sequential decision-making process. Accordingly, the Commission's conclusion that "it is therefore unnecessary to consider the subsidiary elements of the 'sequential decision making process' of § 35-1-67 of the Act" is erroneous.

CONCLUSION

When the Commission found that a significant permanent back impairment existed which was related to the industrial accident, and further found that Mr. Smith could not return to his prior employment of heavy lifting due to that same permanent impairment, medical causation had been proven. Thus, the Commission's conclusions are not supported by the facts or the law. Instead, where it is found that an industrial accident makes up part of a disability claim, the claim should go forth through the sequential decision-making analysis, the Department of Vocational

Rehabilitation, and review of whether the odd lot doctrine is applicable. The law simply mandates this procedure and the Industrial Commission must therefore be reversed.

DATED AND SIGNED this 12th day of February, 1997.



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MAILING CERTIFICATE

I hereby certify that I mailed 2 ~~a~~ true and correct copies ~~copy~~ of the foregoing Appellate Brief with postage prepaid thereon this 14th day of February, 1997, to the following:

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